

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:

BKY 04-34846 GFK

Todd A. Hagedorn,

Chapter 13 Case

Debtor.

**NOTICE OF HEARING AND MOTION OBJECTING TO CONFIRMATION OF
CHAPTER 13 PLAN**

TO: All parties in interest pursuant to Local Rule 9013-3:

1. Jasmine Z. Keller, Chapter 13 Trustee (the "Trustee"), by and through her undersigned attorney, moves the court for the relief requested below and gives notice of hearing.

2. The court will hold a hearing on this motion at 10:30 a.m. on October 28, 2004, in Courtroom 228B, United States Courthouse, 316 North Robert Street, St. Paul, Minnesota.

3. Any response to this motion must be filed and delivered not later than 10:30 a.m. on October 27, 2004, which is 24 hours (1 business day) before the time set for the hearing, or filed and served by mail not later than October 25, 2004, which is three business days before the time set for the hearing. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Bankruptcy Rule 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The Chapter 13 petition commencing this case was filed on August 18, 2004. The case is now pending in this court.

5. This motion arises under 11 U.S.C. § 1322 and 1325 and Bankruptcy Rule 3015. This motion is filed under Bankruptcy Rule 9014 and Local Rules 3015-3, 9006-1, 9013-1 through 9013-5, and such other Local Rules as may apply. Movant requests relief with respect to denial of confirmation of the Debtor's proposed Chapter 13 plan dated August 13, 2004 (the "Plan").

6. According to Schedule I, the Debtor derives his income from employment as a Health and Safety Assistant for Rochester School District #535. Schedule I also discloses a contribution from the Debtor's "roommate" of \$700 per month. The

combined monthly income is \$1,575. The Debtor's expenses in Schedule J total \$1,225 per month. At the § 341 meeting of creditors, the Debtor testified that the "roommate" is actually a domestic partner, and that the relationship has continued for four years. Based upon the Debtor's testimony, the Trustee requested amended Schedules I and J to more accurately reflect the income and expenses of the Debtor and his domestic partner.

7. As of the date of this Objection, no amended schedules have been filed. Such information must be disclosed and evaluated by the Trustee to determine whether the Debtor's Plan meets the "best efforts" test. As such, it is not clear that the Debtor is devoting all of his projected disposable income to payments under the plan for the next 36 months, and the Trustee objects to confirmation of the Debtor's Plan until the Debtor has met the statutory requirement. *11 U.S.C. § 1325(b)(1)(B)*.

8. In Schedule B, the Debtor disclosed an interest in a possible discrimination lawsuit. The Debtor has obtained counsel, although no complaint had been filed at the time of the bankruptcy filing. The value of the Debtor's interest in the lawsuit is listed as "unknown." At this time, it is not clear that the Debtor would be entitled to exempt the entire recovery should he be successful in pursuing the lawsuit. It is not clear that the Debtor's Plan meets the "best interest" test of 11 U.S.C. § 1325(a)(4), and the Trustee objects to confirmation on that basis.

10. The Debtor proposes to pay \$350 per month for 52 months to the Trustee, for a total of \$18,200 ("Plan Funds"). The Debtor proposes to distribute the Plan Funds as follows:

Attorneys' Fees	1,250.00
Priority creditors	\$ 3,310.00
Trustee's Fee	1,078.65 (6.30%)
Triad Financial (Secured)	11,012.00
Unsecured creditors	1,549.35

11. The Debtor estimates his total nonpriority unsecured claims at \$31,711. If the Debtor's estimate is accurate, the proposed distribution to unsecured creditors amounts to no more than 5% of their claims.

12. The Debtor's proposed plan does not meet either of the alternative requirements for confirmation under 11 U.S.C. § 1325(b)(1), in that it does not propose full payment of his unsecured nonpriority debts, nor does it devote all of the Debtor's projected "disposable income" (as that term is defined in 11 U.S.C. § 1325(b)(2)) for the next 36 months toward his plan payments.

13. The Debtor's proposed plan does not meet the "best interest of creditors" test of 11 U.S.C. § 1325(a)(4). Thus far, he has not cooperated with the Trustee in disclosing all of the relevant information necessary to properly evaluate his proposed Plan. *11 U.S.C. § 521(3) and 11 U.S.C. § 1302(b)*.

14. If necessary, the Debtor and/or representatives of the Chapter 13 Trustee

may be called to testify as to the matters alleged in this motion.

WHEREFORE, the Trustee requests that confirmation of the Debtor's proposed Chapter 13 plan be denied, and such other relief as may be just and equitable.

Jasmine Z. Keller, Trustee

Dated: October 20, 2004

/e/ Margaret H. Culp
Thomas E. Johnson, ID # 52000
Margaret H. Culp, ID # 180609
Counsel for Chapter 13 Trustee
12 South 6th Street, Suite 310
Minneapolis, MN 55402-1521
(612) 338-7591

VERIFICATION

I, Thomas E. Johnson, employed by Jasmine Z. Keller, Chapter 13 Trustee, the movant named in the foregoing notice of hearing and motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed: October 20, 2004

/e/ Thomas E. Johnson

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

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MEMORANDUM IN SUPPORT OF OBJECTION TO CONFIRMATION

FACTS

The facts supporting the Trustee's objection are summarized in the accompanying motion and will not be repeated here. The Trustee also relies on the representations made by the debtor in his verified Schedules and Statements on file and of record herein.

LEGAL DISCUSSION

I. Disposable income.

Bankruptcy Code section 1325(b)(1) requires, alternatively, that in order to survive an objection by the Chapter 13 Trustee or an unsecured creditor, a plan must either pay all claims in full, or provide that all of the debtor's projected disposable income for the next three years will be applied to make payments under the plan.

"Disposable income" is defined in 11 U.S.C. § 1325(b)(2)(A) and (B) as "income which is received by the debtor and which is not reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor, . . .; and, if the debtor is in engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business."

In this case, it is not clear that the Debtor is committing all of his projected disposable income for the next three years to make payments under the Plan. According to the Debtor's testimony, and without additional information in the record to the contrary, it is reasonable to assume that the Debtor and his domestic partner function as an economic unit. As such, the income and expenses of the entire household must be disclosed in order to determine whether the Debtor's Plan commits all of his projected disposable income to payments under the Plan. *See, e.g., In re Williamson*, 296 B.R. 760, 764-65 (Bankr. N.D. Ill. 2003); *In re Bottelberghe*, 253 B.R. 256 (Bankr. D. Minn. 2000). Until it is established that the Debtor has met the requirements of 11 U.S.C. § 1325(b)(2)(B), confirmation should be denied.

II. Best Interest.

Creditors are entitled to receive as much in the Chapter 13 case as they would receive if the estate of the debtor were liquidated under Chapter 7. *11 U.S.C. § 1325(a)(4)*. Because the payment to creditors will be delayed during the pendency of the Chapter 13 case, the Plan should provide for more than would be received in a one-time distribution by a Chapter 7 Trustee. In this case, the Debtor has disclosed the existence of a lawsuit, but scheduled its value as “unknown.” Under such circumstances, it is impossible to determine whether or not there any portion of the recovery may be subject to the claims of creditors. Allowing the Debtor to confirm a plan that does not include as additional payments any non-exempt portion of his potential lawsuit recovery violates the “best interest of creditors” test of *11 U.S.C. § 1325(a)(4)*, and the Trustee objects to confirmation on that basis.

III. Disclosures

As part of the bankruptcy process designed to afford financially beleaguered debtors relief from collection efforts of their creditors, debtors receive the benefit of an immediate cessation of collection activities when the automatic stay goes into effect. *See: 11 U.S.C. § 362(a)*. However, the bankruptcy process, in fundamental fairness, imposes upon each debtor the concomitant responsibility to disclose promptly and fully the debtor’s assets and liabilities, together with, in Chapter 13, the means available to fund a meaningful Chapter 13 plan. In this case, the Debtor has failed and refused to properly disclose all of his income and expenses in violation of his responsibilities as part of the bankruptcy process and to the detriment of the Chapter 13 Trustee’s ability to properly administer this case. *See 11 U.S.C. §§ 521(3) and 1302(b)*. For this reason, the Trustee objects to confirmation of the Debtor’s Plan.

CONCLUSION

For the reasons stated herein, confirmation of the Debtor’s proposed Chapter 13 plan should be denied.

Dated: October 20, 2004

Respectfully submitted:

/e/ Margaret H. Culp

Thomas E. Johnson, ID # 52000

Margaret H. Culp, ID # 180609

Counsel for Chapter 13 Trustee

12 S. 6th Street, Suite 310

Minneapolis, MN 55402-1521

(612) 338-7591

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UNSWORN DECLARATION FOR PROOF OF SERVICE

I, Margaret H. Culp, employed by Jasmine Z. Keller, Chapter 13 Trustee, declare that on October 20, 2004, I served Notice of Hearing and Motion Objecting to Confirmation of Plan, Memorandum of Facts and Law and proposed Order on the individual(s) listed below, in the manner described:

By electronic means:

United States Trustee

612-664-5516

David D. Kingsbury, Esq.

952-432-4969

By first class U.S. mail:

Todd A. Hagedorn

2001 Falcon Terrace NW

Stewartville, MN 55976

David D. Kingsbury, Esq.

Kingsbury & Associates, Ltd.

14827 Energy Way

Apple Valley, MN 55124

Hilary B. Bonial, Esq.

Brice, Vander Linden & Wernick, P.C.

9441 LBJ Freeway, Suite 350

Dallas, TX 75243

And I declare, under penalty of perjury, that the foregoing is true and correct.

Executed: October 20, 2004

/e/ Margaret H. Culp

UNITED STATES BANKRUPTCY COURT
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ORDER DENYING CONFIRMATION OF CHAPTER 13 PLAN

At St. Paul, MN, _____, 2004.

The above-entitled matter came on for hearing before the undersigned United States Bankruptcy Judge on the Chapter 13 Trustee's objection to confirmation of the Debtor's proposed Chapter 13 plan.

Appearances were noted in the minutes.

Upon the foregoing objection, arguments of counsel, and all of the files, records and proceedings herein:

IT IS ORDERED:

Confirmation of the Debtor's proposed Chapter 13 plan dated is **DENIED**.

Gregory F. Kishel
Chief United States Bankruptcy Judge